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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11 DAYMON JOHNSON,

12 *Plaintiff,*

13 v.
14

15 STEVE WATKIN, et al.,

16 *Defendants.*

Case No. 1:23-cv-00848-ADA-CDB

Date: N/A
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Judge: Hon. Ana de Alba
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19 MEMORANDUM OF POINTS AND AUTHORITIES
20 IN OPPOSITION TO DEFENDANT CHRISTIAN'S MOTION TO DISMISS
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INTRODUCTION

Sonya Christian has a great deal to say when it comes to drafting the “competencies and criteria” by which Professor Johnson’s fealty to the new state dogma will be measured. Six pages of single-spaced small print dictate to Johnson new ways of thinking, speaking, and teaching, grouped in “themes” from “self-reflection,” “self-improvement,” “service,” and of course, “diversity, equity and inclusion pedagogy and curriculum.” But in seeking to evade responsibility for her actions, and in disclaiming her role as the state’s chief ideological enforcer, Christian’s motion to dismiss offers a near-complete verbatim repetition of her arguments in opposition to Professor Johnson’s motion for a preliminary injunction.

The fact, however, remains that Johnson has good reason to fear violating the standards set forth in the state’s DEIA regulations, whose enforcement Christian is responsible for guiding and directing. As Johnson noted earlier, Christian’s job is to “adopt and publish guidance,” which “shall be maintained” based on “current and emerging” practices or scholarship, and that “shall be used” in setting standards Johnson must meet—or be fired. Christian’s maintenance and enforcement of these regulations, as reflected in her office’s “competencies and criteria,” plainly injure Johnson. More to the point, they injure Johnson by violating his First Amendment rights—discriminating against his viewpoints and compelling him to express and endorse political views against his will. Christian’s motion should be denied.

STATEMENT OF FACTS

Professor Johnson incorporates by reference the full factual exposition contained in his other brief opposing dismissal pending before this Court. *See* Doc. 56 at 1-11. Suffice it to say, under Defendant Christian’s leadership at KCCD—and with her direct and necessary participation, *see* Doc. 8, ¶ 89—KCCD terminated faculty for expressing dissenting political viewpoints that are inconsistent with official DEIA ideology. Johnson now presents here only those facts directly relevant to Defendant Christian in her new role as Chancellor of California Community Colleges.

The regulatory regime

California Education Code § 87732 provides that “[n]o regular employee or academic employee shall be dismissed except for one or more of the following causes: (a) Immoral or

1 unprofessional conduct; (b) Dishonesty; (c) Unsatisfactory performance; (d) Evident unfitness for
 2 service; . . . (f) Persistent violation of, or refusal to obey, the school laws of the state or reasonable
 3 regulations prescribed for the government of the community colleges by the board of governors or
 4 by the governing board of the community college district employing him or her.” A community
 5 college district’s governing board may also terminate an employee for “unprofessional conduct” or
 6 “unsatisfactory performance” per Cal. Educ. Code § 87734, and may suspend and terminate an
 7 employee within 30 days for “immoral conduct” or “willful refusal to perform regular assignments
 8 without reasonable cause, as prescribed by reasonable rules and regulations of the employing
 9 district,” per Cal. Educ. Code § 87735.

10 California’s community college system, of which the Kern Community College District is a
 11 constituent part, “embrace[s] diversity.” Cal. Code Regs. tit. 5, § 51201(a). This commitment
 12 “guide[s] the administration of all programs in the California Community Colleges, consistent with
 13 all applicable state and federal laws and regulations.” *Id.* § 51200. “Embracing diversity means that
 14 *we must intentionally practice acceptance, anti-racism, and respect towards one another and*
 15 *understand that racism, discrimination, and prejudices create and sustain privileges for some while*
 16 *creating and sustaining disadvantages for others.” Id.* § 51201(b) (emphasis added). An “anti-racist”
 17 is defined as one who “understand[s] that racism is pervasive and has been embedded into all
 18 societal structures.” *Diversity, Equity and Inclusion Glossary of Terms*, California Community
 19 Colleges Chancellor’s Office, <https://perma.cc/T22V-V866> at 1 (last visited Oct. 17, 2023)
 20 (hereafter “*Glossary*”). Anti-racists “challenge the values, structures, policies, and behaviors that
 21 perpetuate systemic racism” and are “also willing to admit the times in which they have been
 22 racist.” *Id.* “Practicing antiracism requires constantly identifying, challenging, and upending
 23 existing racist policies to replace them with antiracist policies that foster equity between racial
 24 groups.” *Id.* Moreover, “embracing diversity” requires “acknowledg[ment] that institutional racism,
 25 discrimination, and biases exist,” and a commitment to “eradicat[ing] these from our system,” to
 26 “strive to eliminate those barriers to equity.” Cal. Code Regs. tit. 5, § 51201(c). It requires “that we
 27 act deliberately to create a safe, inclusive, and anti-racist environment” *Id.*

1 “District employees must have or establish proficiency in DEIA-related [diversity, equity,
 2 inclusion, accessibility] performance to teach, work, or lead within California community colleges.”
 3 Cal. Code of Regs. tit. 5, § 53602(b). Faculty must comply with local DEIA policies to maintain
 4 employment. *Id.* § 53425. The California Community Colleges Chancellor “shall adopt and publish
 5 guidance describing DEIA competencies and criteria,” *id.* § 53601(a), which “shall be used as a
 6 reference for locally developed minimum standards in community college district performance
 7 evaluations of employees and faculty tenure reviews.” *Id.* § 53601(b). “To advance DEIA principles
 8 in community college employment, districts shall: (1) include DEIA competencies and criteria as a
 9 minimum standard for evaluating the performance of all employees; (2) ensure that evaluators have
 10 a consistent understanding of how to evaluate employees on DEIA competencies and criteria; (3)
 11 set clear expectations regarding employee performance related to DEIA principles . . . (4) place
 12 significant emphasis on DEIA competencies in employee evaluation and tenure review processes,”
 13 and “(6) ensure an evaluation process that provides employees an opportunity to demonstrate their
 14 understanding of DEIA and anti-racist competencies.” *Id.* § 53602(c).

15 The Chancellor’s DEIA guidance and criteria comprehensively call for faculty to
 16 acknowledge, understand, and apply the state’s political ideology; engage in self-reflection and self-
 17 assessment of their own personal commitment to the ideology; commit themselves to “continuous
 18 improvement” of their “DEI and anti-racism knowledge, skills, and behaviors;” promote and
 19 incorporate DEI and anti-racist pedagogy; analyze data to find support for the ideology; articulate
 20 the importance of the state’s ideology; engage in “service” on behalf of the ideology, including by
 21 leading “DEI and anti-racist efforts by participating in DEI groups, committees, or community
 22 activities;” develop curriculum and pedagogy that promote the ideology; participate in professional
 23 development along ideological lines; and instruct new employees on the “expectations for their
 24 contribution” to the state’s DEI and anti-racist ideology. *See* Exh. A.

25 “Faculty members shall employ teaching, learning, and professional practices that reflect
 26 DEIA and anti-racist principles, and in particular, respect for, and acknowledgement of the diverse
 27 backgrounds of students and colleagues to improve equitable student outcomes and course
 28 completion.” Cal. Code Regs. tit. 5, § 53605(a).

*Defendants’ adoption and enforcement of an official ideology chills
Professor Johnson’s speech, and compels him to speak contrary to his conscience*

Plaintiff Daymon Johnson is a history professor at Bakersfield College, a California community college. Doc. 8 at ¶¶ 15, 59. He succeeded Professor Matthew Garrett as the Faculty Lead for the Renegade Institute for Liberty (“RIFL”), a group in which he has long been active, after Garrett was first disciplined for his political expression. *Id.* ¶¶ 60, 88. RIFL members’ outlook and ideals stand in general opposition to those espoused by many faculty members and members of the school administration, which is aligned with Section 51201(a)’s mandate to “embrace diversity” by, among things, “intentionally practic[ing] . . . anti-racism,” Section 51201(b). *Id.* ¶ 61.

Considering his experience of being investigated by KCCD Defendants over his Facebook posts, Defendants’ adoption of an official political ideology that he rejects, Defendants’ exhortations that their ideology must be affirmed and followed, KCCD Defendants’ application of the termination standards to disfavored speech, and Johnson’s responsibility for some of the speech for which Professor Garrett was fired, Professor Johnson refrains from expressing his political views and from freely participating in the intellectual life of the college for fear that Defendants would enforce state law, investigate and discipline him, and terminate his employment based on his viewpoints. *Id.* ¶ 97.

Johnson’s conscience does not allow him to believe in and practice the state’s “embracing diversity” ideology. He does not believe that racism is pervasive and embedded into all societal structures—particularly at Bakersfield College—and thus he does not wish to challenge the values, structures, policies, and behaviors that, according to others, allegedly perpetuate systemic racism. Johnson does not believe he is racist, and he does not wish to constantly identify, challenge, upend, and replace existing policies. Professor Johnson not only disagrees with the ideology Defendants require him to affirm, but Johnson also believes that his political viewpoints, which he would like to express, are inconsistent with and even defiant of that ideology. *Id.* ¶¶ 154-155.

Johnson identifies generally with the viewpoints espoused by RIFL, and shares many of Garrett’s conservative political views and social values the expression of which Defendants censor and punish. *Id.* ¶ 100. For example, Johnson posted 15 of the 18 RIFL Facebook posts that reference

1 the phrase “cultural Marxism,” a term which Garrett was fired for defending. *Id.* ¶ 101. Johnson,
2 like Garrett, does not agree with Bakersfield College’s apparent definition of what constitutes “hate
3 speech” and believes that what is often considered “hate speech” by some is nonetheless speech
4 protected by the First Amendment. *Id.* ¶ 100. But Johnson now refrains from mentioning “Cultural
5 Marxism.” *Id.* ¶ 101-102. He canceled a speech addressing the topic, and refrains from
6 recommending books that discuss the subject. *Id.* Indeed, mindful of Garrett’s experience, Johnson
7 refrains from inviting speakers on behalf of RIFL, as they would explore similar views. *Id.* ¶ 103.

8 Johnson’s speech is also chilled by the fact that Garrett was disciplined for filing an ethics
9 complaint about Defendant McCrow, in circumstances that Johnson, too, would have complained.
10 *Id.* ¶ 104. And Johnson refrains from speaking further about his department’s curriculum
11 considering Defendants fired Garrett for opposing proposed history courses, and Johnson likewise
12 commented about the same courses to the same committee. *Id.* ¶ 105.

13 Johnson refrains from offering any potentially controversial political views on social media,
14 owing to Defendants’ behavior. *Id.* ¶ 107. He opposes censorship, but mindful that Garrett was fired
15 for not censoring comments on RIFL’s Facebook page, Johnson deleted posts that he believed
16 Defendants would find objectionable and turned over the page’s management to two retired
17 professors. *Id.* Nonetheless, another professor has now filed a complaint against Johnson over
18 commentary that others posted on RIFL’s Facebook page. *Id.* Given his experience being
19 investigated by Defendants over Bond’s complaint, Johnson understands that any of his critics can
20 trigger investigations and potential discipline over his social media use. *Id.* ¶ 99. Indeed,
21 Johnson authored and was responsible for some of the Facebook posts that Defendants attributed to
22 Garrett and used to justify his termination. *Id.* ¶ 105.

23 Defendants’ citation of Garrett’s media appearances as cause for his discipline and
24 termination have also prompted Johnson to turn down invitations to speak to the same media
25 outlets. *Id.* ¶ 111. Johnson has also stopped attending committee meetings where he would share
26 his views on race, diversity, equity, and inclusion, considering that Garrett was fired for just
27 listening to another professor’s comment to him while sitting on that committee. *Id.* ¶ 108. Johnson
28 also refrains from offering conservative views about LGBTQ issues, as Defendants and various

1 progressive professors have linked these topics to DEI. *Id.* ¶ 108-110.

2 Johnson has previously served on numerous screening committees for new hires, and wishes
3 to continue doing so, but he refrains from taking the DEIA training now required to continue such
4 service and will not apply to serve on screening committees because he does not wish to promote
5 DEIA ideology, and will not evaluate faculty based on their DEIA adherence or instruct them on
6 DEIA compliance. *Id.* ¶ 112.

7 Bakersfield College evaluates Johnson’s performance every three years. An unsatisfactory
8 evaluation will lead to remediation and potentially termination. Johnson has just successfully
9 completed an evaluation period and intends to keep working as a professor at Bakersfield College,
10 so his performance moving forward will be evaluated under the new DEIA standards and rules. *Id.* ¶
11 113. The DEIA requirements chill his speech, including his academic freedom in the classroom and
12 as the Faculty Lead of RIFL, and compel him to affirm, promote, and celebrate a political ideology
13 that he rejects and even finds abhorrent. *Id.* ¶¶ 112. Johnson cannot meet the standards set out in the
14 Chancellor’s “Competencies and Criteria,” which will guide KCCD’s evaluation of his teaching,
15 without expressing beliefs and viewpoints that he rejects and without stifling his own viewpoints on
16 political and social topics. *Id.* ¶ 120. Johnson is profoundly opposed to the ideology that Defendants
17 would have him promote rather than criticize, as he is dissuaded from doing for fear of official
18 retribution and loss of employment. *Id.* ¶ 114-147.

19 Almost everything Johnson teaches violates the new DEIA requirements—not just by failing
20 to advance the DEIA and “anti-racist” ideology, but also by criticizing it. Johnson fears that if he
21 continues teaching his courses as he has designed them, he will surely be deemed “unsatisfactory”
22 in his upcoming evaluations. *Id.* ¶ 119. Johnson is set to teach three courses in the upcoming
23 semester which challenge DEI historical narratives and present views incompatible with DEI. In
24 these courses, Johnson assigns books critical of DEI, written by authors who have been targeted by
25 DEI adherents. *Id.* ¶¶ 149-151. Indeed, one DEI sympathizer has already called for Johnson to be
26 fired for recommending and assigning books used in these courses. *Id.* ¶ 152. In the following
27 semester, Johnson will teach history courses that raise the same problems under Defendants’
28 ideological mandates. *Id.* ¶ 149-151. The material Johnson will use, his pedagogy, and the views he

1 will teach are utterly contrary to the state’s DEIA and the Chancellor’s DEIA competency
 2 standards. *Id.* If Johnson teaches his classes as he normally would and always has, he will not be
 3 “demonstrating” or “progressing” toward compliance with the new DEI standards. *Id.* ¶ 148.

4 SUMMARY OF ARGUMENT

5 Christian’s attack on Johnson’s standing to challenge the state’s DEIA regulations, and her
 6 continuing implementation of those regulations through her competencies and criteria, lack merit.
 7 The challenged provisions clearly describe what Johnson must, and must not, do in order “to teach,
 8 work, or lead within California community colleges.” Cal. Code of Regs., tit. 5 § 53602(b). In any
 9 event, courts have long rejected the notion that plaintiffs can only challenge regulations that directly
 10 address their own conduct. The question with respect to standing is not whether a challenged
 11 regulation purports to regulate a plaintiff, but whether it *injures* him. Courts routinely enjoin
 12 regulations at the behest of plaintiffs who might not be the direct subjects of a regulation but are
 13 nonetheless very much injured by them.

14 Johnson can be fired at any time for being out of compliance with state regulations, Cal.
 15 Educ. Code § 87732(f), and his performance *will* be evaluated based on his compliance with these
 16 regulations, as well as his adherence to Christian’s competencies and criteria, Cal. Code of Regs. tit.
 17 5, § 53602. It does not matter that Christian will not sign off on the termination papers, as she did as
 18 KCCD’s Chancellor in firing Garrett. What matters is that Johnson is injured because these
 19 regulations are consequential for him.

20 Johnson’s allegations, assumed true, readily demonstrate that the DEIA regulations and
 21 Christians’ competencies and criteria require adherence to, and expression of, the state’s preferred
 22 DEIA and antiracist ideology and the self-suppression of his opposing views. Antiracism is a
 23 particularized viewpoint, demanding its adherents use a “race-conscious and intersectional lens” as
 24 opposed to, for example, a color-blindness or an individualist lens. This viewpoint is what faculty
 25 must practice, advance, and promote under the challenged regulations in order to meet their
 26 minimum standards for employment and tenure retention. By discriminating based on viewpoint,
 27 and compelling affirmance of beliefs that Johnson rejects, the DEIA regulations and Christian’s
 28 competencies and criteria violate the First Amendment. Christian’s motion should be denied.

ARGUMENT

I. JOHNSON HAS STANDING TO CHALLENGE THE REGULATION AND COMPULSION OF HIS SPEECH.

Christian concedes the three basic elements of standing: injury-in-fact, traceability, and redressability. Doc. 65-1 at 8. “In a pre-enforcement challenge, plaintiffs can show injury in fact by establishing that (1) they intend to violate the law; and (2) have shown a reasonable likelihood that the government will enforce the statute against them.” *Project Veritas v. Schmidt*, 72 F.4th 1043, 1053 (9th Cir. 2023). And “[i]n the context of First Amendment speech, a threat of enforcement may be inherent in the challenged statute, sufficient to meet the constitutional component of the ripeness inquiry.” *Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010) (citations omitted).

The injury here is plain enough, not only with respect to the KCCD Defendants, but with respect to Christian. Johnson has been investigated over his political speech. He intends to continue his non-compliant speech and refuses to advance DEIA and anti-racism ideology. KCCD Defendants have not only fired and disciplined professors for political speech—they fired Garrett, in part, for not censoring Johnson—but have taken the view that § 51201(b)’s adoption of DEIA and anti-racism ideology controls speech even before the newer, more specific regulations issued.

Christian’s predecessor promulgated DEIA competencies and criteria controlling Johnson pursuant to § 53601, which Christian maintains. Johnson has every reason to expect that, when his evaluation period is over, he will be negatively evaluated and suffer for not having complied with the state’s DEIA regulations as implemented per Christian’s vision. That is, should he even last that long, and is not fired earlier under Cal. Educ. Code § 87734(f) for not obeying the regulations.

A. The DEIA Regulations, and Christian’s Competencies and Criteria, Injure Johnson.

Christian errs in claiming that Title 5’s DEIA regulations allegedly “do not apply to Johnson directly.” Dkt. 65-1 at 9. First, “the plaintiff’s intended speech” need only “arguably fall[] within the statute’s reach” in order to afford him standing for a pre-enforcement challenge. *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010) (internal quotation marks omitted). The regulations directly concern Johnson’s speech and silence, mandating that he be evaluated based on his commitment to the state’s ideology and that he incorporates that ideology in his teaching. Yet Johnson’s speech is antithetical to the state’s ideology. *See* Doc. 8, ¶¶ 114-56.

Moreover, for standing purposes, whether the regulations “operate upon community college districts, not upon [faculty],” Dkt. 65-1 at 10, is irrelevant. “Plaintiffs need not be the immediate target of a statute to challenge it.” *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000) (citations omitted). Article III requires only a “causal connection between [plaintiff’s] injury and the conduct complained of.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While such causation is most obvious when the government directly regulates a plaintiff, that does not mean that courts are powerless to address other government-inflicted injuries. “[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded,” even if it may be more difficult to establish. *Id.* at 562.

For example, the Supreme Court upheld a First Amendment challenge to a law barring the publication of drug prices, where the “attack on the statute [was] one made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim[ed] that they would greatly benefit if the prohibition were lifted and advertising freely allowed.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 753 (1976); *cf. NRA of Am. v. BATFE*, 700 F.3d 185, 191-92 (5th Cir. 2012), *overruled in part on other grounds*, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 n.4 (2022) (consumers have standing to challenge law barring dealers from selling them guns). Indeed, the Ninth Circuit upheld California’s standing to challenge insurance regulations based on its claim of economic harm should women lose contraceptive coverage. *California v. Azar*, 911 F.3d 558, 571-72 (9th Cir. 2018). “A causal chain does not fail simply because it has several ‘links,’ provided those links are not hypothetical or tenuous.” *Id.* (internal quotation marks omitted).

There is nothing hypothetical or tenuous about Johnson being punished for his speech or silence that does not comport with standards guided by Christian, who need not be “the sole source of the [injury].” *Barnum Timber Co. v. United States EPA*, 633 F.3d 894, 901 (9th Cir. 2011). Johnson can sue Christian because her conduct has a “determinative or coercive effect upon the action of [KCCD Defendants].” *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 749 (9th Cir. 2020) (internal quotation marks omitted).

Christian’s reliance on *Barke v. Bankes*, 25 F.4th 714 (9th Cir. 2022) (per curiam), is misplaced. Doc. 65-1 at 9-10. The *Barke* plaintiffs feared that the state would “erroneously attribute” their protected anti-union speech, made in their individual capacities, to their employers, leading to charges under a provision barring their employers from deterring or discouraging union membership. *Id.* at 716. But “particularly in light of [the state’s] concessions” that it would not misattribute plaintiffs’ individual speech to their employers, *id.*; *id.* at 720, plaintiffs’ fear was unfounded. Here, in contrast, the DEIA regulations address Johnson’s “minimum qualifications for employment as . . . a faculty member.” Cal. Code Regs., tit. 5, § 53400. They dictate what he must teach, and how. *Id.* § 53605(a). Johnson must satisfy the DEIA mandates “to teach, work, or lead within California community colleges.” *Id.* § 53602(b). The policies Christian shapes are those by which Johnson is evaluated. *Id.* § 53602(a). They apply to “all district employees.” *Id.* § 53425. The college President emailed faculty, including Johnson, quoting Section 51201 for the proposition that “we must intentionally practice . . . anti-racism.” Exh. C. Indeed, Christian’s challenged Competencies and Criteria “are meant to define the skills, knowledge, and behaviors that all California Community College (CCC) employees must demonstrate[.]” Exh. A at 3, and each of its 13 themes “applies to faculty” or to “both faculty and staff.” *Id.* at 3-7.

As the memorandum introducing the Chancellor’s competencies and criteria helpfully explains, “**These regulations impact all the employees of the educational ecosystem.**” Exh. B at 6 (emphasis in the original). As a noun, another term for “impact” is “injury-in-fact.”

B. Christian is Part of the Imminent Problem, Playing a Critical Role in Enforcing the State’s Ideology.

It does not matter that Christian will not be the one who “take[s] any action against Johnson concerning his speech.” Doc. 65-1 at 12. Defendants can be held liable under Section 1983 not only if they “personally participated in a deprivation of the plaintiff’s rights” but also if they “caused such a deprivation to occur.” *Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *see also Falls v. Desantis*, No. 4:22cv166-MW/MJF, 2022 U.S. Dist. LEXIS 240663, at *14 (N.D. Fla. July 8, 2022) (holding the “lack of authority to *directly* punish is hardly decisive.”). “[T]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actor knows or

1 reasonably should know would cause others to inflict the constitutional injury.” *Merritt v. Mackey*,
 2 827 F.2d 1368, 1371 (9th Cir. 1987) (internal quotation marks omitted) (government agents liable
 3 for causing termination from private employment).

4 As Christian admits, the DEIA regulations, as “regulations adopted through the formal
 5 regulatory process[,] are *binding* on districts” Dkt. 65-1 at 10 n. 2 (emphasis added); *see also* Cal.
 6 Educ. Code § 70902(b)(4) (districts must “[e]mploy and assign all personnel not inconsistent with
 7 the minimum standards adopted by the board of governors”). And the DEI competencies articulate
 8 how the regulations work in practice by providing definitions of “the skills, knowledge, and
 9 behaviors that all California Community College (CCC) employees *must demonstrate* to work,
 10 teach, and lead in a diverse environment that celebrates and is inclusive of diversity.” Exh. A at 2
 11 (emphasis added). The DEIA regulations require districts to “include proposed or active
 12 implementation goals to integrate DEIA principles as part of” their required EEO plans, Cal. Code
 13 Regs. tit. 5, § 53602(c)(7), over which Christian has enforcement authority. Cal. Code Regs. tit. 5, §
 14 53024.2. If she is dissatisfied with their DEIA efforts, Christian can direct a college district to
 15 redraft an EEO plan and also “implement specific strategies” beyond the district’s own to guarantee
 16 an EEO plan she approves of. *Id.*

17 This is quite different from the situation presented in *First Interstate Bank of California v.*
 18 *State of California*, 197 Cal. App. 3d 627 (1987). In *First Interstate*, a bank had no recourse against
 19 the state to recover a community college district’s debt, because under California law, “no liability
 20 is created in the state for the acts or omissions of [an] agency,” and a community college district “is
 21 liable for its own obligations.” *Id.* at 634. This statutory scheme is quite different than the one that
 22 charges Christian with ensuring that KCCD implements the DEIA regulations.

23 More instructive is *S.B. v. Cal. Dep’t of Ed*, 327 F. Supp. 3d 1218 (E.D. Cal. 2018), in which
 24 plaintiffs sued California’s Superintendent of Public Instruction over the Education Code’s
 25 implementation. Code. *Id.* at 1235. The Superintendent claimed, like Christian, that the plaintiffs
 26 lacked standing because he was not involved in applying the code to the plaintiff child. *Id.* at 1238.
 27 This Court disagreed. The Superintendent’s “specific enforcement obligations” “to administer and
 28 enforce all state laws applicable to schools under the California Education Code” established “a

1 sufficient causal connection to state an official capacity § 1983 claim.” *Id.* The same holds here.

2 Moreover, Christian is not only empowered to ensure that KCCD implements the DEIA
3 regulations. She is specifically charged with maintaining the “competencies and criteria” that guide
4 the DEIA regime under Cal. Code of Regs. tit. 5, § 53601(b). Christian need not come down to
5 Bakersfield College and personally hand Johnson a 90-day notice or sign off on his termination. She
6 dictates what standards KCCD must meet and has predetermined which ideologies Johnson must
7 demonstrate fealty to in order to keep his job. She plays an *on-going, direct* role in determining
8 what Professor Johnson must and cannot say, what he must and cannot teach.

9 II. JOHNSON STATES VALID CLAIMS AGAINST CHRISTIAN.

10 “When evaluating the sufficiency of a pleading under Fed. R. Civ. P. 12(b)(6), we review
11 only the allegations in the complaint and any attachments or documents incorporated by reference.”
12 *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019) (citation omitted). “We accept the complaint’s
13 well-pleaded factual allegations as true, and construe all inferences in the plaintiff’s favor.” *Id.*
14 (internal quotation marks omitted). Johnson’s complaint details the speech he refrains from
15 offering, and the speech he is compelled to express. Johnson also describes his fear—grounded in
16 Defendants’ conduct, in their challenged regulations, and in their implementing competencies and
17 criteria—compelling him to remain silent and pressuring him to speak in ways that violate his
18 conscience. Johnson’s complaint amply supports his claims against Christian.

19 A. *The DEIA Regulations, and Christian’s Competencies and Criteria, are Neither*
20 *Government Speech nor Antidiscrimination Laws.*

21 Christian asserts the DEIA regulations are constitutional for two contradictory reasons. First,
22 she claims the DEIA regulations simply “express [the Board’s] ideals and principles concerning
23 diversity, equity, inclusion, and accessibility.” Doc. 65-1 at 13. Second, she claims the DEIA
24 regulations actually *are* laws, but they are laws that simply put forth her “policy objective” that
25 districts’ evaluation policies reflect these aspirational diversity goals. *Id.* Neither claim has merit.

26 The DEIA Regulations do not merely “affirm the Board’s ‘official position’ to ‘embrace
27 diversity’ . . . and direct the State’s community college districts to create their own employment
28 policies consistent with that goal,” Doc. 65-1 at 14-15 (citations omitted), as though none of this has

1 the slightest influence on faculty. The goal of these “employment policies,” which local districts are
2 commanded by regulation to adopt, and which they must implement with an eye toward Christian’s
3 competencies and criteria, is to fire faculty that do not become “anti-racists.”

4 The situation presented here is quite unlike that found in *Downs v. Los Angeles Unified Sch.*
5 *Dist.*, 228 F.3d 1003 (9th Cir. 2000), which concerned a true case of government speech. In *Downs*,
6 a school set up bulletin boards “as an expressive vehicle for the school board’s policy of ‘Educating
7 for Diversity.’” *Id.* at 1012. “[A]ll speech that occurred on the bulletin boards was the school
8 board’s and LAUSD’s speech,” *id.*, and so plaintiff teacher had no First Amendment right to
9 establish his own bulletin board. But the school did not compel Downs to believe or express its
10 views, did not suggest that Downs would be punished for rejecting its views, and did not trample on
11 Downs’s academic freedom to teach a different perspective (a right that, while enjoyed by college
12 professors, may not extend to high school teachers).

13 The other case Christian cites in support of her government speech argument, *Bair v.*
14 *Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), presents a useful contrast between
15 government speech and an impermissible speech code, standing for the proposition that “[s]imply
16 utilizing buzzwords applicable to anti-discrimination legislation does not cure [a First Amendment]
17 deficiency.” *Id.* at 372. The court agreed that “one of the challenged sentences within the Preamble
18 to the University Catalog does not implicate First Amendment concerns,” as it “seeks to advise the
19 student body of the University’s ideals and is therefore aspirational rather than restrictive.” *Id.* at
20 370. And it found that another challenged provision was, in part, “merely aspirational” before
21 concluding that, overall, the provision was unconstitutionally overbroad. *Id.* at 371.

22 Overall, the court chided the college for using aspirational language as a fig leaf to cover
23 unlawful restrictions. “Time and again in this case, Defendant has asserted that the challenged
24 provisions of the Code are merely aspirational and precatory, and therefore not subject to First
25 Amendment scrutiny. This argument fails because it is obvious that violations of the express
26 provisions of the Code subject Shippensburg students to the disciplinary process set forth therein.”
27 *Id.* at 373. Likewise here, whatever sentiments the state might mean to express do not wash away
28

1 the express provisions commanding Johnson’s ideological compliance in violation of the First
2 Amendment.¹

3 Indeed, the DEIA regulations compel *anti-racist* speech, not antidiscrimination. Initially,
4 “antiracism” may sound harmless. After all, who wants to be against being against racism? But
5 antiracism is not synonymous with “antidiscrimination;” in fact, it *requires* unlawful discrimination
6 based on race. The Constitution does not countenance so-called benign discrimination. *Adarand*
7 *Constructors v. Pena*, 515 U.S. 200, 227 (1995). But according to the anti-racism advocate upon
8 whom Christian relies, antiracism demands the *presence*, not the absence, of discrimination to
9 obtain equity: “The only remedy to negative racist discrimination that produces inequity is *positive*
10 *antiracist discrimination* that produces equity.” Kendi, Ibram X., *How To Be An Antiracist* 24
11 (2023) (emphasis added).² “To be antiracist is a *radical* choice in the face of this history, requiring a
12 radical reorientation of our consciousness.” *Id.* at 29 (emphasis added).

13 Anti-racism further posits that unequal outcomes based on race are always the product of
14 racist policies and that colorblindness is itself a form of white supremacy. *Id.* at 11 (“The language
15 of color blindness—like the language of ‘not racist’—is a mask to hide when someone is being
16 racist A colorblind Constitution for a White-supremacist America.”). As Kendi says it: “there
17 is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every
18 community in every nation is producing or sustaining either racial inequity or equity between racial
19 groups.” *Id.* at 21. To put a finer point on it, Kendi explicitly declares that claiming to not being
20 racist is itself racist. *Id.* at 29.

21 Antiracism is also a totalizing ideology, because it requires adherents to make race-
22 conscious decisions in all aspects of their lives. The DEIA regulations and Competencies and
23 Criteria codify this Kendian antiracism ideology into an employment requirement, and that is why
24 they are unlike any other law that prohibits discriminatory conduct. Christian’s demand that
25 Johnson “intentionally practice . . . anti-racism” through the minimum standards of employment she
26 _____

27 ¹ Despite Christian’s insistence that the case has not been overruled, Doc. 62, *Alpha Delta Chi-Delta Chapter*
28 *v. Reed*, 648 F.3d 790 (9th Cir. 2011) did not make the cut-and-paste from her previous brief.

² For example, the “Glossary of Terms” related to DEIA policies, which the Chancellor authored, cites to
Kendi’s book as the source of her definition of “anti-racist.” *Glossary* at 1.

1 set is not unlike the State telling employees to practice patriotism (by reciting the Pledge of
 2 Allegiance) or Christianity (by praying). It is not a prohibition of discrimination, it is compulsion to
 3 express a particular ideology.

4 Officials can certainly debate the merits of race-conscious decision-making, but they cannot
 5 enforce DEIA regulations that force Johnson and his colleagues to take a position on the topic —
 6 and to conform their teaching and expression to it. State officials are free to advocate for changing
 7 legal norms on their own time and on their own dime. But the First Amendment bars them from
 8 abusing their offices to coerce others into affirming and promoting their politics.

9 *B. The Complaint Plainly States a Viewpoint Discrimination Claim Against Christian.*

10 While Christian correctly points out that “[v]iewpoint discrimination” occurs when the
 11 government prohibits ‘speech by particular speakers,’ thereby suppressing a particular view about a
 12 subject,” Doc. 65-1 at 15 (quotation omitted), that is just one example of the First Amendment’s
 13 much broader, *complete* proscription of viewpoint discrimination. The “government must abstain
 14 from regulating speech when the specific motivating ideology or the opinion or perspective of the
 15 speaker is the rationale for the restriction.” *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir.
 16 2022) (quoting *Rosenberger v. Record & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).
 17 “[R]estrictions based on content must satisfy strict scrutiny, and those based on viewpoints are
 18 prohibited.” *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). Thus, even if the DEIA
 19 regulations and Christian’s competencies and criteria only offered Johnson “extra credit” for
 20 advancing the state’s ideology, but did not punish him for failing to do so, they would be
 21 unconstitutional for favoring the state’s pet ideology and discriminating against other viewpoints.

22 There is nothing “conclusory” about Johnson’s claim that the DEIA regulations, and the
 23 competencies and criteria that Christian maintains under their guise, impose viewpoint
 24 discrimination by mandating advancement of the state’s ideology. As the complaint explains, the
 25 language therein clearly requires faculty to endorse the government’s views on DEIA. Professors
 26 have no choice. They must affirm a “race-conscious and intersectional” viewpoint in their lessons
 27 and course materials, even if they strongly support a “color blind” approach or, like Johnson, do not
 28 believe systemic racism exists in all societal structures. Doc. 8 ¶¶ 51, 154. They must apply “anti-

1 racist perspectives” - “perspective” is arguably synonymous with “viewpoint” – to “problem
 2 solving, policies and processes.” *Id.* ¶ 45. And they must shift to “DEI and antiracist perspectives”
 3 in all environments as well as “advocate” and “promote” those perspectives above any other point
 4 of view on discrimination. *Id.* ¶¶ 41, 45, 51,

5 The DEIA regulations do not only tell professors what they *have* to say, they also govern
 6 what professors *cannot* say. Professors must avoid expressing views that contradict the
 7 government’s, lest they be deemed to have failed to “demonstrate they have met the DEI
 8 competencies using concrete examples based on DEI criteria provided in [the Competencies and
 9 Criteria].” Exh. A at 2. For example, Professors cannot present arguments or assign materials
 10 promoting a contrary “lens,” like color-blindness, to one that is “race conscious and intersectional.”
 11 Doc. 8 ¶ 54. They cannot opine that racism is not “embedded into all societal structures.” *Glossary*
 12 at 1. They cannot state “I am not racist,” because doing so means they are in “denial of the
 13 inequities and racial problems that exist” and, therefore, they are not being antiracist. *Glossary* at 1.

14 The only “conclusory” claims before the Court are Christian’s denial of the complaint’s
 15 plain text, and of the plain text of the DEIA regulations and her competencies and criteria. Indeed,
 16 for the most part, her attacks on the sufficiency of the viewpoint discrimination claim merely
 17 recycle her earlier arguments the challenged provisions “do not apply directly to Johnson, do not
 18 regulate Johnson’s speech or expressive activity, and do not contain any mechanism by which
 19 Chancellor Christian or the Board may take any adverse action against Johnson if he expresses his
 20 viewpoints.” Doc. 65-1 at 16. As explained *supra*, none of this is correct. The regulations *do* apply
 21 to Johnson, though that does not matter because in any event they plainly regulate his speech. If he
 22 fails to comply, he can be fired, upon his three-year review or at any time. Christian is responsible
 23 for maintaining the guidelines per which Johnson would be held to account for his ideology, and she
 24 is a responsible participant in the constitutional deprivation. The operative complaint states a valid
 25 viewpoint discrimination claim against Christian.

26 C. The DEIA Regulations Compel Specific Ideological Speech.

27 Contrary to Christian’s assertion, Johnson’s complaint clearly states a claim for compelled
 28 speech. Laws compel speech when they “[f]orc[e] free and independent individuals to endorse ideas

1 they find objectionable” and “coerce[] [them] into betraying their convictions.” *Janus v. Am. Fed’n*
 2 *of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). The notion that “the
 3 challenged regulations do not force Johnson to accommodate any particular message in his own
 4 speech,” Doc. 65-1 at 17, is risible. “Faculty members shall employ teaching, learning, and
 5 professional practices that reflect DEIA and anti-racist principles.” Doc. 8 ¶ 41 (quoting Cal. Code
 6 of Regs. tit. 5, § 53605(a)). “District employees must have or establish proficiency in DEIA-related
 7 performance to teach, work, or lead within California community colleges.” *Id.* ¶ 40 (quoting Cal.
 8 Code of Regs. tit. 5, § 53602(b)). Christian’s competencies and criteria that help implement these
 9 regulations are rife with speech mandates. For example, faculty are evaluated based on whether they
 10 “[a]cknowledge[] that cultural and social identities are diverse, fluid, and intersectional,” *id.* ¶ 45
 11 (quoting Exh. A at 2-3); “demonstrate[] . . . awareness” and “understanding” of the state’s ideology,
 12 *id.*; “[p]romote[] and incorporate[] DEI and anti-racist pedagogy,” *id.* ¶ 48 (quoting Exh. A at 3);
 13 “[a]rticulate[] the importance and impact of DEI and anti-racism,” *id.* ¶ 50 (quoting Exh. A at 3);
 14 “[a]dvocate[] for and advances DEI and anti-racist goals and initiatives,” *id.* ¶ 51 (quoting Exh. A at
 15 4); and “[a]rticulate[] the connection of DEI and anti-racist efforts to the institution’s mission and
 16 the *Visions for Success*,” *id.* at ¶ 56 (quoting Exh. A at 5). And this is just a sample.

17 The speech being compelled is very much Johnson’s speech. Not all of it must take place in
 18 the classroom. And to the extent that it must, it is still not within the state’s prerogative to dictate
 19 Johnson’s expression of such speech because the First Amendment guarantees him a measure of
 20 academic freedom. “[T]eaching and [academic] writing are ‘a special concern of the First
 21 Amendment.’” *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (quoting *Keyishian v. Bd. of*
 22 *Regents*, 385 U.S. 589, 603 (1967)). “The Supreme Court has repeatedly stressed the importance of
 23 protecting academic freedom under the First Amendment,” which “does not tolerate laws that cast a
 24 pall of orthodoxy over the classroom.” *Id.* (quoting *Keyishian*, 385 U.S. at 603).

25 Christian’s reliance on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47
 26 (2006), is misplaced. In *Rumsfeld*, the Supreme Court held that a federal law requiring law schools
 27 to afford equal campus access to military recruiters did not compel the schools’ speech. “As a
 28 general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools

1 must *do*--afford equal access to military recruiters--not what they may or may not *say*.” *Id.* at 60. To
 2 the extent the statute compelled speech, such compulsion was “incidental to the [statute’s]
 3 regulation of conduct.” *Id.* at 62. Because the statute required equal access, the law schools were
 4 required to carry all recruiting announcements if they chose to carry any recruiting announcements.
 5 And unlike the organization of a parade, “a law school’s decision to allow recruiters on campus is
 6 not inherently expressive.” *Id.* at 64. Granting equal access to all recruiters did not dilute or alter the
 7 schools’ expression.

8 The challenged DEIA regulations and competencies and criteria do not merely regulate
 9 conduct, nor do they regulate speech only incidentally to their regulation of conduct. They compel
 10 Johnson to advocate particular messages—even to engage in “self-reflection” about his own
 11 commitment to the state’s ideology and “self-improvement” in conforming himself to the state’s
 12 model vision of an ideologue. Doc. 8 ¶¶ 46, 47 (quoting Exh. A at 3).

13 And again, these provisions are all quite enforceable against Prof. Johnson. If he fails to
 14 measure up, he will be dismissed upon a poor evaluation, or directly under the Education Code for
 15 not following state regulations. Chancellor Christian is a direct participant in this regime because
 16 she maintains the overarching standards DEIA, and she oversees KCCD’s EEO plan, which must
 17 accommodate these regulations as she sees it.

18 *D. This Court Should Provide Leave to Amend Prior to Dismissing for Failure to State*
 19 *a Claim.*

20 “[I]n dismissals for failure to state a claim, a district court should grant leave to amend even
 21 if no request to amend the pleading was made, unless it determines that the pleading could not
 22 possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection*
 23 *Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). Indeed, “it is of no consequence that [a plaintiff] d[oes]
 24 not file a formal motion, accompanied by a proposed amendment, requesting leave to amend.” *Id.*

25 Christian’s Motion fails because she asks this Court to do what it cannot – refrain from
 26 assuming Johnson’s allegations as true – and rule in her favor by reading the challenged regulations
 27 in a way that is unsupported by their plain language. However, to the extent this Court disagrees and
 28 finds merit in Christian’s 12(b)(6) arguments, Plaintiff requests leave to amend his complaint to
 correct any factual deficiencies the Court identifies.

CONCLUSION

This Court should deny Christian's motion to dismiss.

Dated: October 17, 2023

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2023, I electronically filed the foregoing with the Clerk using the Court's CM/ECF system, and that all participants in this case are registered CM/ECF users who have thereby been electronically served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 17, 2023.

/s/ Alan Gura
Alan Gura